IN THE

Supreme Court of the United States

OCTOBER TERM—1976

No. 76-613

FRANCIS X. DONOVAN,
Petitioner,

—against—

PENN SHIPPING CO., INC. and
PENN TRANS. CO., INC.,
Respondents.

RESPONDENTS' BRIEF IN OPPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Cases Cited

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Statement

After receiving a jury verdict of $90,000.00 in February 1974, the trial judge ordered a new trial on damages unless plaintiff would agree to a remittitur of $25,000.00 and accept judgment of $65,000.00. Plaintiff sought to accept remittitur under protest. After a year's delay of his own making, plaintiff submitted ex parte a form of judgment which was signed on August 6, 1975. This "judgment"

purported to accept the remittitur, but "conditionally", and then he appealed this improper judgment. The decision of the United States Court of Appeals for the Second Circuit was handed down on June 8, 1976 dismissing the appeal with costs to the appellees. Plaintiff's petition for rehearing, containing a suggestion that the action be reheard en banc, was denied on August 4, 1976 with no judge requesting a vote be taken on the suggestion. In November 1976 plaintiff filed a petition for a writ of certiorari.

POINT I

So called conditional acceptance of remittitur by a plaintiff is not a practice the Second Circuit cares to adopt for legal and practical reasons.

The Second Circuit refused to adopt the practice of the Fifth Circuit that allows acceptance of remittitur by a plaintiff under protest followed by a direct appeal to the Circuit Court, bypassing a second trial, to review the discretionary action of the trial judge. This procedure, of course, destroys the defendant's right to a new trial ordered by the trial judge because the jury award was shocking, the verdict was unconscionable, and the trial court offers to each side the option of agreeing to the court determination of a fair award, or of a new trial. Plaintiff's suggestion frustrates the very intent of the remittitur power of the trial judge.

In very practical terms the Second Circuit summarized their point as follows (opinion set forth in petitioner's brief):

> "Suffice to say that we disagree with appellant's basic contention that already over-extended judicial resources would better be husbanded by permitting immediate appeal from orders of remittitur. Were such a course available, a plaintiff would have nothing to lose by accepting a remittitur 'under protest,' thereby guaranteeing himself a minimum verdict, and then proceeding to the court of appeals in an effort to restore the sum which had been disallowed by the district judge. The proliferation of appeals would be the inevitable consequence.
>
> "In contrast, experience has demonstrated that the interest in judicial administration is well served by the present practice of treating orders of remittitur as interlocutory and therefore unappealable. See *Woodworth* v. *Chesbrough,* 244 U.S. 79 (1917); 9 J. Moore, Federal Practice ¶ 203.06, at 721 n.31. As appellant conceded during oral argument, most plaintiffs now accept the remittitur thus necessitating a second trial in only a small minority of cases. Finality and repose are achieved precisely because '[t]he risks of a verdict less than the amount to which the remittitur order has reduced the plaintiff's recovery are . . . calculated to induce most reasonable plaintiffs to accept the remittitur and call it a day.' *Evans,* slip op. at 3260.
>
> "That such risks are real was graphically illustrated in *Reinertsen,* where the first jury returned a verdict of $75,000, the order of remittitur reduced the award to $45,000 and the second jury granted just $16,000. The prejudice to the defendant in allowing the plaintiff to bypass the second trial and obtain direct review of the remittitur is therefore obvious. The defendant's right to have a second jury consider the issue of damages, although conditioned upon the plaintiff's having first rejected the remittitur, is nonetheless a

valuable one. It should not be lightly disregarded. Furthermore, in those rare instances where a second trial is required, it provides yet an additional gauge by which the court of appeals can judge the propriety of the remittitur."

In *Evans* v. *Calmar S.S. Co.*, 534 F. 2d 519 (2 Cir. 1976), the Court also addressed the problem in practical terms:

> "Plaintiff argues that judicial economy would be better served by allowing for immediate appeal from an order of remittitur and thereby avoiding the necessity of a second trial. We disagree. Evans' argument is premised upon the faulty proposition that most remittiturs are in fact rejected. Although no hard data is available, experience shows the opposite to be the case. An order of remittitur frequently provides the means for ending the case by acceptance of the remittitur and payment of the judgment. The trouble and expense of a new trial are therefore eliminated.
>
> "The risks of a verdict less than the amount to which the remittitur order has reduced the plaintiff's recovery are obviously calculated to induce most reasonable plaintiffs to accept the remittitur and call it a day. Such risks are real as trial judges are loathe to reduce a jury award unless the verdict reaches an amount considerably in excess of what is reasonable. Indeed, the amount the trial judge estimates as acceptable is denominated an outside figure, so that even that figure is one beyond what the trial judge would have found, absent a jury. This analysis is supported by the fact that in only a very small percentage of appeals in which the propriety of the remittitur order is

> passed on does the court of appeals find such order to be an abuse of discretion. E.g. *Reinertsen* v. *Rogers,* supra." (reported 519 F. 2d 531 (2 Cir. 1975)).

In *Slatton* v. *Martin K. Eby Construction Corp.*, 491 F. 2d 707 (8 Cir. 1974) the question of whether an order granting a new trial solely on the issue of damages in a Jones Act case was directly appealable, was squarely presented and was answered in the negative. The order appealed from was not a final determination and was simply non-appealable.

The *Slatton* case was retried on the damage issue and the plaintiff was awarded not only substantially less than the original jury award but substantially less than the suggested remitted amount. In affirming the judgment after the second trial, the Eighth Circuit made some pertinent comments on the deference given to the trial judge's discretionary power. 506 F. 2d 505, at pp. 508, 509:

> "We have traditionally given trial judges a large range of discretion in ruling on motions for new trial, particularly on the weight of the evidence, in recognition of the fact that they have heard the testimony and observed demeanor of the witnesses and are more aware of the community and its standards. Solomon Dehydrating Co. v. Guyton, *supra,* 294 F.2d at 447. Further, it is settled that the action of the trial court in setting aside a jury verdict is not in derogation of the right to trial by jury, 'but is one of the historic safeguards of that right.' Altrichter v. Shell Oil Co., 263 F.2d 377, 380 (8th Cir. 1959), *quoting* Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350, 353 (4th Cir. 1941).
>
> "The issue presented as to the standard of review of a remittitur ordered as a condition of

denying a new trial motion is one of first impression in this circuit. We have carefully considered the competing considerations mentioned above and the decision in Gorsalitz v. Olin Mathieson Chemical Corp., 429 F.2d 1033 (5th Cir. 1970), where the same issue was presented for decision. We conclude that the standard we will apply in determining whether there was an abuse of discretion in ordering the remittitur is whether the remittitur was ordered for an amount less than the jury could reasonably find. Gorsalitz v. Olin Mathieson Chemical Corp., 456 F.2d 180 (5th Cir. 1972). *Cf.* Taylor v. Washington Terminal Co., *supra,* 409 F.2d at 148:

> "'In this jurisdiction particularly, District Court judges have given great weight to jury verdicts. They have stated that a new trial motion will not be granted unless the 'verdict is so unreasonably high as to result in a miscarriage of justice,' or, most recently, unless the verdict is 'so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate.'
>
> "At the appellate level, in reviewing a trial judge's grant of a new trial for excessive verdict, we should not apply the same standard. The trial judge's view that a verdict is outside the proper range deserves considerable deference. His exercise of discretion in granting the motion is reviewable only for abuse. Thus we will reverse the grant of a new trial for excessive verdict only where the quantum of damages found by the jury was *clearly* within 'the maximum limit of a reasonable range.'

> "The trial court's determination of a reasonable limit to the jury award will be given considerable deference in our review."

In *Woodworth* v. *Chesbrough,* 244 U.S. 79 (1917), the Supreme Court dismissed the plaintiff's appeal by finding that filing remittitur was a waiver by plaintiff of his right to litigate damages further. The Court found remittitur to be a condition precedent to judgment from which plaintiff appealed and that plaintiff's contest of remittitur in the appellate court removed the condition precedent and also the judgment itself, and returned the proceeding in the lower court to an unappealable status.

CONCLUSION

The plaintiff's petition for a writ of certiorari should be denied.

Respectfully submitted,

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